No. 97-1764

(2)

Supreme Court, U.S.
FILED
MAY 21 1998
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

RACHEL BAUCHMAN,

Petitioner,

v.

WEST HIGH SCHOOL, *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

PETITIONER'S SUPPLEMENTAL BRIEF UNDER RULE 15.8

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6 pp

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Six days after the Petition was submitted in this case, the Court decided *Crawford-El* v. *Britton*, No. 96-827, 1998 WL 213193 (U.S. May 4, 1998), which provides an additional reason for granting the petition and summarily reversing the decision below, or at least vacating and remanding for reconsideration in light of this Court's intervening decision.

In *Crawford-El*, the Court held that the courts of appeals may not craft special procedural rules for constitutional claims that require proof of improper purpose. *Id.* at *11-*13. In the instant case, the Tenth Circuit did just that, requiring that allegations of an unlawful religious purpose in Establishment Clause cases had to be supported by express, contemporaneous admissions of religious intent and that historical and circumstantial evidence would not be considered. *Bauchman* v. *West High School*, 132 F.3d 542, 560-61 (10th Cir. 1997) (Rachel Bauchman's Petition for Writ of Certiorari ("Petn.") at A39-A40).

1. The petitioner in *Crawford-El* was a prisoner who alleged that a prison official's supposed misdirection of packages containing his personal belongings was done in retaliation for protected First Amendment activities. The District of Columbia Circuit had announced a new rule that plaintiffs alleging constitutional torts that required proof of an improper purpose had to establish that motive by clear and convincing evidence. *Crawford-El* v. *Britton*, 93 F.3d 813, 815 (D.C. Cir. 1996), *vacated and remanded*, No. 96-827, 1998 WL 213193 (U.S. May 4, 1998). This Court rejected that rule, holding that the proper balance between barring valid claims and freeing public officials from the burdens of answering meritless litigation "does not justify a judicial revision of the law to bar claims that depend on proof of an official's motive." 1998 WL 213193, at *10.

2. This Court's holding is squarely applicable to this case. In *Crawford-El*, both the court of appeals and this Court made clear that their holdings applied "to the wide array of different federal law claims for which an official's motive is a necessary element." *Id.* at *7; *see also* 93 F.3d at 823 (finding clear- and-convincing-evidence standard appropriate "for constitutional torts based on improper motive"). This case presents allegations that conduct undertaken with the purpose of promoting religion constituted a violation of the Establishment Clause. Petitioner alleges that her high school music teacher, among other things, scheduled almost entirely Christian-oriented music, instructed the class that a true appreciation of music comes through religious experience, scheduled class performances in Mormon churches and buildings, offered a prayer at a class performance, and criticized petitioner in class for questioning these practices, all with the purpose of promoting and endorsing the Mormon religion. Petn. at 4-5. As the court below recognized, albeit begrudgingly, this conduct would be improper if done for a religious purpose, *Bauchman*, 132 F.3d at 552-53 (Petn. at A20-

A21), and thus this is a claim of a constitutional tort for which an improper purpose is a necessary element.[1]

3. Like the District of Columbia Circuit, the Tenth Circuit in this case imposed an improperly elevated burden of proving intent for this species of constitutional torts. In fact, the Tenth Circuit's requirement that such intent must be established by direct evidence rather than circumstantial or historical evidence, 132 F.3d at 560-61 (Petn. at A39-A40), was precisely the test that the District of Columbia Circuit had earlier adopted and then abandoned in *Crawford-El* in favor of the clear-and-convincing-evidence standard, 1998 WL 213193, at *5 n.5; 93 F.3d at 815, 817-18. This Court rejected both proposed tests. 1998 WL 213193, at *9 (finding no support "for making any change in the nature of the plaintiff's burden of proving a constitutional violation").

The Court held that the most that may be required to survive a prediscovery motion for dismissal or summary judgment is that the plaintiff "'put forward specific, nonconclusory factual allegations' that establish improper motive." *Id.* at *14 (*quoting Siegert* v. *Gilley*, 500 U.S. 226, 236 (1991) (Kennedy, J., concurring in judgment)). The court below *conceded* that the Amended Complaint in this action met that test. *See* 93 F.3d at 559 (Petn. at A37) (Amended Complaint "clearly asserts defendants' conduct was motivated by a religious purpose" and "contains numerous allegations to support Ms. Bauchman's claim that Mr. Torgerson has unconstitutionally promoted his religious beliefs in the classroom for over twenty years").

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[1] Petitioner's Amended Complaint also alleged that Torgerson's conduct had the illegal effect of advancing religion, involving government in religious entanglements, and endorsing religion. Amended Complaint ¶¶ 6, 16-17; Tenth Circuit Appendix 152-53; 157-69. The court of appeals did not separately address these claims, relying on the district court's treatment of them. 93 F.3d at 561 (Petn. at A40-A41). The court's error in this portion of its analysis is raised by the second question presented by the Petition. *See* Petn. at 17.

Conclusion

This Court's decision in *Crawford-El* makes yet clearer that the Tenth Circuit's decision is both important and erroneous. While this case would justify plenary consideration in order to reinforce the central concerns of Establishment Clause jurisprudence, *see* Petn. at 10-11, *Crawford-El* also provides a sound basis on which to summarily reverse the Tenth Circuit's decision. Viewed under the ordinary standards required by *Crawford-El*, the Amended Complaint clearly stated a cause of action under the Establishment Clause and this Court's past decisions making clear that government action undertaken with the purpose of promoting religion is plainly unconstitutional. *See* Petn. at 11 (citing cases). In the event the Court has any doubt as to the proper application of *Crawford-El* to the Amended Complaint in this case — and we submit that there

should not be any — the Court should vacate the Tenth Circuit's decision and remand this matter for reconsideration in light of *Crawford-El*.

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